

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KAREN SUE MAXTON**

Claimant

VS.

**U.S.D. #259**

Self-Insured Respondent

Docket No. **1,058,144**

**ORDER**

Self-insured respondent requests review of the February 9, 2012 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

**ISSUES**

The claimant suffered an injury to her right shoulder in a fall at her home on August 15, 2011. She contacted her family physician for treatment. On August 31, 2011, as she was escorting a student at work, the student dropped to the floor pulling her right arm down and back as she was walking forward. Claimant testified this occurred three times before she got the student to the location they were heading. Ultimately, a rotator cuff tear was diagnosed. But respondent denied the alleged accident at work was the prevailing factor in causing her injury.

The Administrative Law Judge (ALJ) found claimant's accidental injury at work was the prevailing factor in causing claimant's injury. The ALJ noted, in part:

The 'prevailing factor' is determined by the Court after hearing all pertinent evidence. A doctor's opinion is only part of the evidence to be considered and is not a presumptive opinion of prevailing factor.<sup>1</sup>

Respondent requests review of whether claimant's accidental injury arose out of and in the course of her employment on August 31, 2011. Respondent argues that claimant's accident at home on August 15, 2011, was the prevailing factor in causing her injury and therefore the ALJ's Order should be reversed.

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<sup>1</sup> ALJ Order (Feb. 9, 2012) at 2.

Claimant argues that her home accident did not cause her rotator cuff injury as she was initially diagnosed with a shoulder sprain after that incident. She further argues that her work accident is the prevailing factor and therefore, the ALJ's Order should be affirmed.

The sole issue on this appeal from a preliminary hearing is whether claimant suffered accidental injury arising out of and in the course of her employment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant began her employment with respondent in 2003. On August 15, 2011, claimant injured her right shoulder at home when she tripped over a power cord and caught herself to keep from hitting the floor. Claimant was able to move her arm up, down, overhead and to the side but she immediately experienced pain. Claimant placed her arm in a sling and self medicated with ibuprofen. Claimant then called the office of Dr. Arthur Windholz, her family physician, described the incident and noted ibuprofen was not managing her pain. The doctor prescribed Lortab and scheduled an appointment with claimant for the next day. When claimant visited Dr. Windholz on August 16, 2011, she provided a history that she had tripped, caught herself with her right arm but hyperextended her right shoulder behind her. Dr. Windholz continued claimant's prescriptions and recommended rest, ice and gentle range of motion. Another appointment was scheduled.

Claimant continued working and testified that her shoulder condition was improving. Claimant works with handicapped children and as she was escorting a 10-year-old, 80-pound girl across the classroom she was holding her by the hand, but the child did not want to go and dropped to the floor. The claimant described the August 31, 2011 incident in the following fashion:

Q. Now then, what were you doing with her when this incident occurred?

A. I was escorting her across the room, holding her -- holding her hand with my right hand.

Q. And did she want to go across the room?

A. No, sir.

Q. And what happened?

A. She did as a normal toddler would do and dropped dead weight to the floor, pulling back on me and twisting as I was trying to --

Q. Were you walking forward?

A. I was walking forward, and so when she dropped, I just finished the step that I was taking, but --

Q. Did she go backwards?

A. Yes, sir.

Q. What position did that put your shoulder in at that time?

A. On this arm, back like this, and she had twisted my arm.<sup>2</sup>

Claimant testified that this exact same thing happened a second and third time before she got the child across the room. She further testified that the pain from the incidents at work was completely different from when she fell at home.

Claimant was referred to Dr. Mark Melhorn for treatment. Dr. Melhorn initially diagnosed a right shoulder sprain/strain but he was concerned that claimant might have a rotator cuff tear. The September 13, 2011 MRI findings indicated a small joint effusion, fluid within the bursa as well as thickening and increased signal in the distal supraspinatus which would be indicative of a full thickness tear of the rotator cuff. After conservative treatment failed to improve claimant's condition Dr. Melhorn recommended surgery.

Respondent then asked Dr. Melhorn whether the incident at work was the prevailing factor for claimant's shoulder condition and need for surgery. Dr. Melhorn responded that because he had not seen claimant after her fall at home it was difficult for him to indicate whether the fall at home was the initiating event for her shoulder injury or whether the work activities caused or aggravated the at-home injury. Dr. Melhorn concluded that claimant's work activities could have contributed to or aggravated claimant's preexisting shoulder rotator cuff disease. Respondent then sent a second letter to Dr. Melhorn, dated September 2, 2011, which noted the recent change in the law regarding "prevailing factor" and again asked the doctor to address whether the incident at work was the prevailing factor. Dr. Melhorn then concluded that claimant's fall at home was the prevailing factor in her condition.

Conversely, Dr. Windholz noted that when he treated claimant on August 16, 2011, for her right shoulder injury he did not believe she had an injury as severe as a torn rotator cuff. And he noted it was his understanding that claimant later suffered a more significant injury at work.

K.S.A. 2011 Supp. 44-508(d) provides:

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<sup>2</sup> P.H. Trans. at 8.

'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

And K.S.A. 2011 Supp. 44-508(g) provides:

'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

After the preliminary hearing the ALJ summarized the evidence in the following manner:

**THE COURT:** Well, we've got conflicting opinions apparently by Dr. Melhorn. On October 6<sup>th</sup> in his letter, he says, in response to your request, unfortunately not having originally seen the patient, it is difficult for me to be able to indicate whether or not the fall at home was the initiating event for her shulder injury or if the work activities caused or aggravated the fall.

**MR. BURNETT:** That's why we followed up with Dr. Melhorn, because aggravation is not the standard.

**THE COURT:** Okay, I'm making my ruling, don't interrupt. Then in December, why he changes it, after receiving a letter apparently from the respondent. Claimant's Exhibit 3 by Dr. Windholz says that, I did see Karen on 8-16 for a minor right shoulder injury sustained at home the day before. At that time I did not believe she had an injury as severe as a torn rotator cuff. I recommended rest and observation. I think I saw a later note of Dr. Windholz' office that prior to this incident at work, she was improving. And then she has this incident at work and ends up with a torn rotator cuff, so logic would only conclude that the incident at work was the prevailing factor for the torn rotator cuff, so therefore, she was injured out of and in the course of her employment with the respondent on August 31st, 2011.<sup>3</sup>

This Board Member agrees and affirms.

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<sup>3</sup> P.H. Trans. at 24-25.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>5</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated February 9, 2012, is affirmed.

**IT IS SO ORDERED.**

Dated this 27th day of April, 2012.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: James B. Zongker, Attorney for Claimant, sgastineau@hzflaw.com  
Vincent A. Burnett, Attorney for Respondent, Vburnett@MTSQH.com  
John D. Clark, Administrative Law Judge

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<sup>4</sup> K.S.A. 44-534a.

<sup>5</sup> K.S.A. 2011 Supp. 44-555c(k).